

**Public Law Board No. 5428
Case No. 1
Award No. 1**

**Carrier File No. 16S(92-89)
Organization File No. ---**

Parties to the Dispute:

**Sheet Metal Workers' International Association
and
CSX Transportation Company**

Statement of the Claim:

- "1. The Carrier has violated the provisions of the current and controlling agreement, and in particular Rule 26 of said agreement, when on October 16, 1992 they improperly dismissed Sheet Metal Worker Leroy Moore, Jr. following an investigation that was held on October 9, 1992.**
- 2. That accordingly, the Carrier be directed to return Mr. Moore to service with compensation for all time lost, including overtime he may have been deprived of; remove any impairment to his seniority, make him whole for all vacation rights, reimburse Mr. Moore or his dependents for all medical or dental expenses incurred while improperly out of service, pay for Claimant's life insurance; compensate the Claimant for all contractual Holidays, bereavement leave, jury duty and all other applicable contractual benefits he may have been deprived of while being improperly withheld from service."**

Opinion of the Board:

Claimant began his service with Carrier as a Sheetmetal Worker on May 17, 1976. The specific location and details of Claimant's initial work assignment, and his job progression thereafter, are not at issue in the instant proceeding; and, therefore, will not be commented upon further in this Award.

On Sunday, May 24, 1992, Claimant was assigned as a Sheetmetal Worker/Pipefitter on the Second Shift at Carrier's Barr Yard Car Shop in Riverdale, Illinois. At approximately 4 PM on the day in question, Claimant was assigned the duty of connecting the air hoses and cables between several locomotives at the Car Shop Ready Track. While connecting the hoses and cables together on Locomotive #2118, the engine revved up; and it began to move itself and the three (3) other locomotives which were hooked-up behind it. Claimant quickly determined that the locomotive was a runaway; so he jumped into the cab of Locomotive #2118 and disabled the locomotive, but not until the locomotive ran over a derail. While so engaged, Claimant allegedly was thrown about the cab of the Locomotive; but he did not appear to be injured at that time; and, as a result, he did not file an "Employee's Report of Personal Injury or Occupational Illness" form with Carrier.

For his quick thinking and action in this incident, Claimant was awarded Carrier's Green Safety Award; and he was presented with a gift of a Sony radio by Carrier.

Claimant maintains that shortly after the accident, he began to experience some minor discomfort and stiffness throughout his body in general; but he still did not believe that it was bad enough to fill-out an injury report; and he further believed that he could "work out" the minor pain.

Claimant continued to work his regular duties for several weeks after the occurrence of the above described accident. During this period of time, Claimant made no complaint whatsoever to his supervisor(s) concerning any physical discomfort or pain on his part.

During the first two (2) weeks of July 1992, Claimant was on vacation visiting his brother James C. Moore, in Warner Robbins, Georgia. Claimant's

brother, apparently, is a medical doctor, who had recently moved to Georgia after having previously practiced medicine in the Chicago, Illinois area for several years. While in medical practice in Chicago, Claimant's brother allegedly treated Claimant and his family.

According to Claimant, on or about July 3, 1993, while vacationing at his brother's home, he (Claimant) awoke and experienced severe leg and back pain causing him to remain in bed that day. Claimant maintains that he was subsequently examined by his brother, the physician, who recommended that Claimant receive extensive physical therapy for his neck and his back condition when he returned home to Chicago; and also that Claimant remain off work for sixty (60) days.

After returning to Chicago, on July 9, 1992, Claimant telephoned Carrier and marked-off sick; but he did not indicate the nature of his sickness at that time. On July 11, 1993, Claimant again telephoned Carrier, and spoke to General Foreman D. E. Gross, with whom Claimant requested a meeting. Mr. Gross advised Claimant that he (Gross) would be unavailable for the next two (2) days. Once again, in that telephone conversation, Claimant made no mention of his having suffered a personal on-the-job injury.

On July 15, 1992, Claimant met with General Foreman Gross; and, according to Mr. Gross, Claimant gave him (Gross) a letter from his physician brother explaining Claimant's back/neck condition; and the need "...for aggressive physical therapy" and a sixty (60) days leave of absence from work.¹ In addition, in that same meeting, Claimant further explained that he (Claimant) believed that the source of his physical condition was

¹ Said letter has not been included in the record which has been presented in this case. Carrier, however, does not dispute that Claimant did, in fact, present such a letter to Mr. Gross on July 15, 1992.

attributable to the on-the-job accident which had occurred at the Ready Track on May 24, 1992. Claimant then requested and was provided with an "Employee's Report of Personal Injury or Occupational Illness" form, which he completed; and which, in general terms, indicated that Claimant had sustained a "... back and neck injury ..." at 4 PM on May 24, 1992, "(W)hile attempting to stop (a) runaway locomotive ..." at Carrier's Barr Yard Car Shop Ready Track.

As a result of the above described incident, in a letter dated July 28, 1992, Claimant was advised by Carrier that he was to attend a formal investigation on August 11, 1992, which was to be held in order to investigate the following charge:

"... violation of Safety Rule No. 40, due to your failure to promptly report injury you allegedly sustained on May 24, 1992 in that you did not make this report until July 15, 1992."

Said investigation was postponed on several occasions at Claimant's/Organization's request, and was rescheduled for September 9, 1992. On September 9, 1992, Claimant's investigative hearing was convened, but Claimant was not present. Claimant's Organizational Representative requested a further postponement and rescheduling of the hearing. This request was granted by the Hearing Officer; and said hearing was finally held and concluded on October 9, 1992, with Claimant present and offering testimony. As a result of said investigation, in a letter dated October 16, 1992, Claimant was apprised by Carrier that he had been found guilty as charged; that his (Claimant's) action was a "... violation of safety rule 40, failure to promptly report an alleged personal injury";² and that, as a

² In its written submission, Carrier also contended that Claimant's action herein was also a violation of the Schedule Agreement's Rule 28. Said Rule 28, however, was not cited previously by Carrier in the original Statement of Charges; nor was it referenced by Carrier

consequence, Claimant was to be dismissed from Carrier's service. Rule No. 40, in pertinent part, reads as follows:

"An employee, if physically able to do so, must make an immediate oral and written report to the supervisor or employee in charge of any personal injury suffered while on duty or on Company property. Upon receipt of such report, the employee in charge or the supervisor must make a prompt written report of the injury. The injured employee must furnish the written injury report on the prescribed form; or if the injured employee is unable to do so, the required report must be furnished by the supervisor or by the employee in charge."

Claimant/Organization filed a timely claim on Claimant's behalf in protest of Carrier's dismissal of Claimant. Said claim, for reasons which will be discussed more fully hereinafter, was denied by Carrier; and the matter was appealed by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, the matter was appealed to arbitration by Organization; the undersigned Board was properly constituted and authorized to hear and decide this matter; and, pursuant to hearing, the matter is now properly before this Board for resolution.

Carrier argues the following three (3) major points:

First, Carrier asserts that Claimant was afforded a fair and impartial hearing in this matter as is required under Agreement Rule No. 26. According to Carrier, this fact was acknowledged by Claimant himself at his investigative hearing.

during the conducting of Claimant's investigative hearing, or included in Carrier's October 16, 1992 dismissal letter to Claimant.

Rule 28, reads as follows:

"Employees injured while at work will not be required to make accident reports before they are given medical attention, but will make them as soon as practicable thereafter. Proper medical attention will be given at the earliest possible moment, and employees shall be permitted to return to work without signing a release pending final settlement of the case"

Second, Carrier maintains that it (Carrier) has sustained its evidentiary burden of producing substantial evidence with which to establish Claimant's guilt in the instant case. In support of this particular contention, Carrier cites various portions of the investigative hearing transcript wherein Claimant testified that he had experienced some minor discomfort on the date of the accident, as well as throughout the following several weeks during which he worked; but that he did not report this to Management. Said failure on Claimant's part, Carrier contends, is a clear violation of Rules 28 and 40.

Carrier's third and final major area of argumentation herein is that Claimant's dismissal was justified due to the seriousness of the particular type of infraction which is involved. As further support for this contention, Carrier cites several Board awards which generally establish that the reporting of on-the-job accidents and injuries is an important duty placed upon injured employees; and that failure to comply with this particular requirement justly warrants the dismissal of the erring employee.

Organization's initial argument in this case is a procedural objection in that Organization alleges that Claimant did not receive a fair and impartial hearing as is required by Rule 26. In this regard, Organization contends that Carrier waited almost one (1) full month to charge Claimant in this matter; and furthermore, Carrier's action herein was improperly motivated by the fear on Carrier's part that Claimant was going to sue Carrier for the injury(ies) which he sustained while on duty on May 24, 1992.

Turning to the merits portion of this case, Organization maintains that Claimant notified Carrier as soon as he became aware of his physical injuries; and that he did not do so sooner because, on May 24, 1992, he did not realize that he had, in fact, been injured. According to Organization,

prior to his temporary/total incapacitation, which occurred while he was visiting his physician/brother's home in Georgia on or about July 3, 1992, Claimant thought that he was only experiencing general soreness due to the accident which occurred while he was on duty on Carrier's property on May 24, 1992. Furthermore, according to Organization, Claimant was concerned about reporting a minor injury to Carrier because he was afraid that it would be considered as a frivolous complaint, which could result in disciplinary action -- including dismissal.

Organization's final merits argument herein is that Claimant's dismissal was totally excessive given that Claimant's prior work record shows that he has not had any prior work related injuries; and, moreover, Claimant's disciplinary record shows that he was only assessed a ten (10) days deferred suspension (which was later converted to a ten [10] days actual suspension) and a five (5) days actual suspension in 1988 and 1989 respectively for excessive absenteeism.

For obvious reasons, the initial point of departure in this analysis is Organization's contention that Carrier committed various procedural errors in the handling of the instant dispute. In this regard, suffice it to say that the Board is of the opinion that Organization's procedural arguments are unmeritorious. The Statement of Charges and Rule citation contained therein are found to have been sufficiently precise to properly apprise Claimant of the nature of Carrier's case against him; and to enable Claimant/Organization to prepare an adequate defense. In addition, Carrier's delay in issuing the Notice of Hearing does not appear to have been excessive or a violation of the applicable rules, given the nature of the triggering incident and Carrier's need to conduct a preliminary inquiry in order to determine whether or not to file charges against Claimant in the

first place. Lastly, Organization's allegation of Carrier retaliation against Claimant because of an alleged threat by Claimant to sue Carrier for the injury(ies) which were allegedly sustained by him while on duty on May 24, 1992, is not supported by any probative evidence whatsoever.

Having disposed of Organization's procedural contentions, we next focus upon the merits portion of the case. Upon due consideration, the Board concludes that Claimant failed to promptly report his subject injury in this matter as is required by Rule No. 40 of the parties' applicable rules. In support of this determination, the evidence of record which has been presented herein clearly establishes that Claimant, by his own admission, was working hurt subsequent to the May 24, 1992 accident; and that he himself was also of the opinion that said soreness/pain was due to the accident itself. Accordingly, Claimant should have made this fact known to the appropriate Carrier official(s); and he (Claimant) should have also filed the appropriate "Employee's Report of Personal Injury or Occupational Illness" form at that time when he first became aware of his condition. Claimant's hindsight admission at the investigative hearing clearly establishes the proper course of action to follow in such a situation; and further establishes that Claimant was aware of the existence of such a procedure. In this regard, the following exchange which took place at the hearing between Claimant and his Local Chairman, R. W. Baker, is most revealing:

Mr. Baker: Would you handle this exactly the same way if it had happened over again?

Claimant: If it happened over again, no I wouldn't.

Mr. Baker: What would you do differently?

Claimant: What I would do differently is I would request to be examined by a doctor immediately, if there was no sign of pain or what ever the case may be, just for my own protection and that's the way I would handle it" (Tr. p. 8).

Claimant's above admission(s) and his rationale thereof serves the precise purpose for which Rule No. 40 exists -- and Claimant should have followed such a prudent course of action in the instant case. Failing to do so, Claimant made himself vulnerable, and subject to the assessment of appropriate disciplinary action.

The preceding determination(s) leaves unresolved only the matter of whether dismissal was the appropriate quantum of discipline to have been assessed by Carrier in the instant case. In this regard, the Board is of the opinion that although Rule No. 40, by necessity (both for the employee's benefit and that of Carrier), is a strict rule which requires complete compliance with, nonetheless, the assessment of the penalty of dismissal in the instant case is considered to be particularly severe and excessive; and thus was improper. As support for the above posited conclusion, the Board notes that the record which has been presented herein establishes that Claimant is a long-time employee with a good service record. Moreover, the subject dismissal is considered to be particularly harsh since Claimant suffered his injury(ies) while performing an act above and beyond the call of duty by disabling a runaway locomotive, thereby averting potential disaster and considerable financial loss to Carrier.

For all of the above reasons, we hold that Claimant violated Rule No. 40 by failing to promptly report his injury(ies) to Management as is required; however, in consideration of the aforestated mitigating circumstances surrounding this matter, Claimant's dismissal is considered to be excessive, and, therefore, shall be modified instead to a thirty (30) days suspension

without pay which is to run from October 16, 1992 through November 16, 1992; Claimant's seniority and all other applicable contractual rights and benefits shall also be restored to him unimpaired; and Claimant's personnel record shall also be amended to reflect this change.

Award:

Claim sustained; and remedy directed as indicated hereinabove.



John J. Mikrut, Jr.
Chairman and Neutral Member



R. S. Bauman
Organization Member

Dissent attached



M. K. Carmichael
Carrier Member

Issued in Columbia, Missouri on December 15, 1993.

PUBLIC LAW BOARD NO. 5428
DISSENT OF CARRIER MEMBER TO AWARD NO. 1

The majority erred in its decision to restore the Claimant to service in that Mr. Moore was clearly guilty of the most serious offense of reporting an injury more than six weeks after it allegedly occurred. This was in clear violation of Safety Rule 40 and fully justified the Claimant's dismissal. The Board erred, further, in reducing the penalty to a thirty day suspension. While the Board concurred completely with the Carrier's finding of guilt, it determined that the penalty was too harsh. Numerous awards have held that unless the discipline assessed by a Carrier is arbitrary, capricious or unreasonable, it is not the function of the Board to modify it. Among those awards are the following:

Third Division Award No. 8431 (Daugherty):

" . . . The Board will not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion."

Third Division Award No. 24303 (Silagi):

"The decisions of this Board have consistently held that within the scope of its review, both as to culpability and the amount of discipline, the ruling made on the property will not be disturbed when the charge is supported by substantial evidence and the amount of discipline is not arbitrary or capricious."

In view of the clear finding of guilt, supported by the Board, of the serious charges at issue, the discipline of dismissal was fully justified and should have been upheld.

Respectfully submitted,

M. K. Carmichael

M. K. Carmichael
Carrier Member